Filed 6/6/17 P. v. Jones CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RYANN LYNN JONES,

Defendant and Appellant.

F068996

(Super. Ct. No. VCF219203)

ORDER MODIFYING OPINION AND DENYING REHEARING
[No Change in Judgment]

It is ordered that the opinion filed herein on May 17, 2017, be modified as follows:

1. On page 35 of the slip opinion, the first full paragraph under the sideheading ***Golden Rule Argument***, beginning "To the extent" is deleted.

2. On page 35, the first sentence of the second full paragraph under the sideheading ***Golden Rule Argument***, beginning "Turning to the merits" is deleted and the following sentences and footnote, which requires the renumbering of subsequent footnotes, are inserted in its place:

> We reject defendant's argument.[5] We note, in contrast to the prosecutor's comments in *Vance*, the prosecutor here did not continue with improper argument after the objections were sustained.

3. On page 35, the text of the new footnote 5 is as follows:

To the extent the prosecutor's statements concerning the fear Natalynn experienced constituted improper Golden Rule argument, defense counsel lodged no objection to these comments. Defense counsel did lodge timely objections to the prosecutor's victim impact statements in closing argument. Although the failure to lodge a timely objection on the proper ground to alleged prosecutorial misconduct constitutes a forfeiture of the issue on appeal (see *People v. Mendoza* (2007) 42 Ca1.4th 686, 705), we do not resolve the Golden Rule argument on this basis and reach the merits of all of defendant's challenges to the prosecutor's closing argument.

There is no change in the judgment.

Appellant's petition for rehearing is denied.

_____
PEÑA, J.

WE CONCUR:

_____
GOMES, Acting P.J.

_____
DETJEN, J.

Filed 5/17/17 P. v. Jones CA5 (unmodified version)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RYANN LYNN JONES,

Defendant and Appellant.

F068996

(Super. Ct. No. VCF219203)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Stephen Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

Defendant Ryann Lynn Jones was acquitted of first degree murder of three-year-old Natalynn Miller but was found guilty at the conclusion of a jury trial on December 20, 2013, of second degree murder (Pen. Code, § 187, subd. (a);[1] count 1) and assault causing the death of a child (§ 273ab, subd. (a); count 2). The jury found not true a special circumstance allegation for torture alleged in count 1. On February 19, 2014, the trial court sentenced defendant to prison for a term of 25 years to life for assault causing the death of a child and to a term of 15 years to life for second degree murder, which was stayed pursuant to section 654.[2] The court granted defendant actual custody credits of 1,793 days, conduct credits of 267 days, and total custody credits of 2,060 days. In a subsequent order, the trial court struck defendant's conduct credits pursuant to section 2933.2.[3]

On appeal, defendant contends the identification procedure used for witnesses to incidents at a McDonald's restaurant involving defendant were unduly suggestive, and the trial court erred in allowing the witnesses to testify. Defendant further contends there

---

[1]Unless otherwise designated, all statutory references are to the Penal Code.

[2]During the announcement of the jury verdicts on December 20, 2013, the court correctly read the verdicts but the minute order incorrectly recorded the verdict on count 2. At sentencing, the trial court transposed the charges for counts 1 and 2. The abstract of judgment prepared February 25, 2014, reflects this mistake and shows that defendant was sentenced to a term of 25 years to life for second degree murder when defendant was sentenced to that term for assault causing the death of a child. On March 13, 2014, the trial court amended the abstract of judgment by minute order to correctly reflect that defendant was convicted of second degree murder in count 1 and assault causing the death of a child in count 2. However, the abstract of judgment incorrectly refers to count 2 as being a violation of section 273a when defendant was convicted of section 273ab, subdivision (a).

These are clerical errors that can be corrected at any time, including on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705.) We will remand to the trial court to amend and prepare a new abstract of judgment and to forward it to the proper authorities.

[3]This amendment should also be reflected in the new abstract of judgment.

was prosecutorial misconduct during closing argument to the jury and cumulative error. We reject these contentions and affirm the judgment.

FACTS

Report of Child in Respiratory Arrest

On Sunday March 22, 2009, at 5:41 p.m., Detective Jared Hughes of the Visalia police department was dispatched to investigate a report of a nonbreathing child who was three and a half years old. Hughes arrived at the location two minutes later and saw defendant running outside, holding a child in his arms. Sergeant Randy Lentzner arrived at about the same time. Defendant followed Hughes's instruction to place the child down on the grass. Hughes found Natalynn's skin cool to the touch and she was pale white. Natalynn had no pulse, was soaking wet, and lifeless. Hughes made sure Natalynn's throat was clear and tilted her head back. Lentzner placed a breathing mask over Natalynn's face and gave her the first rescue breath. Hughes saw Natalynn's chest rising. They achieved a faint pulse and did not perform any chest compressions. Paramedics arrived within two minutes and took over Natalynn's care.

Hughes briefly spoke to defendant and viewed the apartment. Hughes then followed Natalynn to the hospital. Most of her clothing had been removed. Hughes saw bruising on her chest, forehead, behind her ears, right shoulder, back, wrists, knee, inner thigh, and left nostril. After Natalynn was pronounced deceased, Hughes took photographs to document her injuries. The photographs were received into evidence.

Ryan Morgan was an EMT (emergency medical technician) paramedic dispatched to the emergency call along with his partner, EMT David Rodgers. Morgan determined Natalynn was not breathing and had no pulse; the cardiac monitor showed she was asystole, meaning she was dead. He and Rodgers administered life support by providing one hundred percent oxygen and performing compressions on Natalynn's chest. Natalynn was soaking wet from head to toe. It seemed strange she was so wet and still in her clothes. Morgan and Rodgers testified they had seen the officers performing chest

compressions. Rodgers recalled Natalynn's airway was blocked, so he performed back blows to dislodge the blockage and performed hand CPR.

Morgan asked what happened. Defendant said Natalynn had been in her room and she had eaten pizza. Defendant then mentioned something about the bathroom and the tub. Morgan could not definitely remember who told him this information.

It took Natalynn four minutes to arrive to the hospital by ambulance. Natalynn arrived at the hospital intubated with a tube going into her lungs. Dr. Kealani Sine, a pediatric hospitalist, attended Natalynn at the hospital with the emergency room physician; she had no heart rate and was dead. Dr. Sine was suspicious that Natalynn's bruising was not caused by accidental trauma. Although she was already dead, Dr. Sine ordered a full body scan of Natalynn. Dr. Sine did not have the results of the scan. In Natalynn's condition, there was no chance emergency room doctors and nurses could revive her, but due to her young age they tried to do so for 15 minutes.

Police Investigation

Hughes spoke briefly to defendant, who appeared to have been crying and was pacing back and forth. Hughes briefly went to Natalynn's apartment while Natalynn was being attended to. Another officer walked defendant over to the apartment. Hughes asked defendant what happened. Defendant's initial response was he did not know. Defendant explained he was dating Natalynn's mother, Nicole Lee. Defendant told Hughes he did not live in the apartment and did not know the address. Hughes walked briefly into Natalynn's apartment. Natalynn's room was messy. A lower dresser drawer was pulled out and toys were scattered about.

Defendant did not know if Natalynn had been choking on something but she had been eating pizza 20 minutes earlier and was fine. Hughes followed the ambulance to the hospital and stayed with Natalynn. At the hospital, Hughes talked to Troy Miller, Natalynn's father. Miller was inconsolable. Miller was crying and made several statements that Natalynn was killed.

At the hospital, Hughes contacted Natalynn's mother, Nicole Lee, after Natalynn died. Lee was upset. Defendant arrived at the hospital thereafter. Lee had defendant view Natalynn with her and account for some of Natalynn's bruises. Upon seeing Natalynn's body, Lee broke down and immediately pointed to a bruise on Natalynn's right temple. Lee asked defendant, "'What's this?'" Lee asked defendant about a line across Natalynn's forehead. In response, defendant turned to a nurse and asked if they had received scan reports of Natalynn's body.

Lentzner also went into Natalynn's apartment. Another officer was with defendant in the apartment. Lentzner briefly went into Natalynn's room and the bathroom. There was residual water in the bathtub, which appeared to have been recently drained. Lentzner took photographs of the apartment. What looked like blood, vomit, and hair was on the kitchen counter next to the sink where defendant tried to revive Natalynn. No human tissue, blood, or hair was collected from the apartment. No holes were found in the walls of the apartment. Photographs of the scene were admitted into evidence and shown to the jury.

Chris Moore lived in the apartment above Lee. Moore woke up late on Sunday, March 22 with a hangover. Moore was functioning fine and called for a pizza. Moore heard a loud rumbling noise for about 15 minutes from the apartment below and believed it came from a video game. He had not heard the noise before. At some point the noise stopped.

Later, Moore heard a loud thumping noise on the wall at least six times. It was not like a noise caused by hammering. The noise was sequential and happened very quickly. Moore described it as, "boom, boom, boom, boom, boom, boom." Moore then heard a voice saying, "'Come on, baby, wake up, baby.'" The noise was coming from directly beneath Moore. Moore did not know the people and did not go downstairs. Moore described himself as startled and shocked.

Linda Cavazos was also one of Lee's neighbors. Cavazos did not remember hearing anything loud or unusual on March 22, 2009, but said she kept her television on loud. She did remember hearing a bunch of sirens that day.

Defendant's Statements to Investigators

Detective Osvaldo Dominguez questioned defendant twice and recorded these sessions. The first time was the day Natalynn died inside her apartment. The audio recording of the questioning was played for the jury. Defendant told Dominguez he and Natalynn were in the apartment alone. Natalynn had been running around, doing crafts, and running back into her room. Defendant said he heard a noise. When defendant went into Natalynn's room to check on her, she was lying limp on the ground with her eyes rolled back. Defendant took Natalynn to the sink, splashed water on her face, and pushed on her stomach. Natalynn began to vomit. Defendant performed CPR. Defendant panicked because Natalynn turned blue, so he called 911. When asked if anything like this happened before, defendant said one time when Natalynn was spinning around she got dizzy and fell, hitting her head on a safe in the closet.

On March 25, 2009, Dominguez again questioned and recorded defendant about the circumstances leading to Natalynn's death. The recording of the questioning session was played for the jury. Defendant told Dominguez that on the morning Natalynn died, defendant went with her and Lee to a swap meet and had lunch with his mother. They returned to their apartment about 1:15 p.m. Natalynn and her mother played and made crafts until Lee left for work between 4:35 and 4:40 p.m. Defendant was alone with Natalynn.

Defendant explained Natalynn became upset because her mother was leaving. Natalynn was crying, running toward the door to catch her mother, and "threw a fit." Defendant told Natalynn to stop her tantrum or he would give her a spanking. Defendant swatted Natalynn on the behind twice; she calmed down and started watching television.

According to defendant, Natalynn began to run around the kitchen island, switching directions. Natalynn cut one turn too close and banged her head on the wall. Natalynn looked at defendant and asked him to come over to her. Defendant kissed Natalynn's head. She whimpered a little and then kept running around. Defendant went back to his recliner and could hear Natalynn playing with her toys.

Defendant had been playing the video game "Resident Evil 5." Defendant did not worry about Natalynn being alone in her room because she was not very adventuresome. As he was sitting in the living room, he heard a thud like Natalynn had jumped off her bed. It was a real solid sound. Defendant waited for Natalynn to cry. He waited a few seconds, heard nothing, and got up from his chair. Defendant said he found Natalynn up against the dresser. He thought she had fallen asleep. Defendant bent over and spoke to Natalynn, but she did not respond. Defendant thought Natalynn was unconscious. He brought her to the kitchen, splashed water on her, and noticed her mouth was open and her face was clenched.

Defendant pushed on Natalynn's stomach, which appeared bloated. Natalynn was not breathing. Defendant administered CPR and called 911. Defendant also said that days earlier he told Natalynn to get her socks from her dresser. When defendant entered her room, Natalynn was standing on her bed to reach into her dresser. She was startled and fell from the bed, again hitting her head.

Defendant told investigators it was okay to spank a child and he had done so to Natalynn about five times. Defendant knew no one who would want to abuse Natalynn and described Lee as being easy on her. Defendant thought the bruises on Natalynn were from the time she fell off her bed and the lesion on her nostril was from putting a freshwater clam shell up her nose. Defendant described Natalynn as accident prone. Dominguez showed defendant Natalynn's autopsy photographs depicting extensive bruising and told him Natalynn had massive bleeding between the scalp and her skull,

bleeding in her brain, and bleeding in her stomach. When Dominguez asked defendant how this could have happened, defendant had no explanation.

Defendant insisted he would never do anything to hurt Natalynn and did everything he could to save her life. When it was pointed out defendant was with Natalynn and she had "hellacious bruises" that needed to be explained, defendant admitted there were "more bruises than her just bumping her head." Defendant conceded the bruises were "not from her doing" and had "to be from somewhere else."

Defendant was arrested on March 25, 2009, after he was questioned by police.

Autopsy

Dr. Burr Hartman was the forensic pathologist who conducted Natalynn's autopsy on March 24, 2009. Natalynn was 37 inches tall and weighed 30 pounds. During his external examination of Natalynn, Dr. Hartman observed many bruises and contusions on Natalynn's body. There were bruises and injuries to Natalynn's abdomen, chest, back, and head. After examining and photographing Natalynn's body, Dr. Hartman examined her internally.

Dr. Hartman found bruising along the midline of a portion of Natalynn's mesentery of the small colon, the transverse colon, and the sigmoid colon near the spine. Dr. Hartman described this as abdominal trauma caused by a blow to the abdomen. Abdominal injuries to children do not occur from CPR because the procedure is performed on the chest and mouth and the compressions used in CPR are too gentle to injure anything. Dr. Hartman described Natalynn's abdominal injuries as acute because there was fresh bleeding from them. It would be "very unusual" for a child Natalynn's age to have self-inflicted her abdominal injuries.

When he examined Natalynn's skull, Dr. Hartman did not find skull fractures, but he found bleeding under the skull beneath the dura mater covering the surface of the brain. Dr. Hartman explained it would be exceptional for Natalynn to have caused these injuries unless she had some sort of mental illness. Dr. Hartman described the

photographs he had taken of Natalynn's body depicting the bruises and injuries. The photographs were admitted into evidence.[4]

Dr. Hartman explained a person has to be alive to form a bruise. In Dr. Hartman's opinion, Natalynn's injuries were all acute, in close proximity to each other, and explained her death. Dr. Hartman concluded Natalynn died from multiple blunt force trauma to the head, abdomen, and chest. Although Dr. Hartman found no injury to Natalynn's heart, he explained a sharp blow to the chest can cause commotio cordis—the stopping of the heart without showing an anatomic injury. Natalynn's injuries occurred in close succession to one another.

Medical Expert Opinions

Dr. Frederic Bruhn, a board-certified pediatrician, testified as an expert on physical child abuse. After reviewing all of Natalynn's medical records, Dr. Bruhn concluded Natalynn died from multiple blunt force trauma resulting from a nonaccidental homicide. Dr. Bruhn further explained it was not likely Natalynn would have suffered subdural hematomas from falling off her dresser next to her bed or from falling off her bed.

Dr. Joseph Cohen is a forensic pathologist who contracts to perform autopsies in Marin and Napa Counties. Dr. Cohen had conducted over 6,000 autopsies, hundreds of which were performed on children. Dr. Cohen reviewed Natalynn's medical reports, reports of the paramedics, fire department reports, and preliminary hearing testimony from defendant's case. Dr. Cohen concluded Natalynn's head injuries would have caused death in minutes, not hours. Dr. Cohen also concluded Natalynn was already dead when paramedics and firefighters began to attend her.

---

[4]Photographs depicting the bleeding around Natalynn's brain were also admitted into evidence.

Given the "package" of multiple bruises over Natalynn's body, Dr. Cohen did not believe her injuries were self-inflicted or accidental. There could be some bruising from administration of CPR, but not to the extent of Natalynn's bruising and not when CPR is conducted on someone already dead. Most of Natalynn's internal injuries could not have been caused by CPR, even if it was improperly performed. One exception was bruising to her hilum behind the liver. A small intestine injury would not occur during CPR on a dead person. People frequently vomit during CPR or in the process of dying, which would explain the presence of vomit in the lungs.

Although Dr. Cohen did not find Dr. Hartman's autopsy report was perfect, the fact he did not take and study tissue samples from Natalynn was immaterial to understanding how Natalynn died. While the injuries to Natalynn's abdomen were acute, she could have survived those injuries. According to Dr. Cohen, Natalynn died from multiple blunt impact injuries to her head. Dr. Cohen believed Natalynn's neurological deterioration was immediate after she was injured and she did not die from choking.

The defense called Max Jehle, an agricultural biologist and pest management specialist. Jehle explained there is a species of freshwater mussel in California creeks and water sheds, including the Kaweah Reservoir. The species is found in Mill Creek in Tulare County. The mussels can pick up bacteria in the water from animal feces. Among the pathogens found in water sources is E. coli. Even in dry conditions, biofilms of bacteria can remain on the shells. On cross-examination, Jehle said he had never personally tested clam shells.

Defendant called Dr. Harry Bonnell, a board-certified pathologist, who also reviewed Natalynn's relevant medical records. Dr. Bonnell also reviewed the testimony of Dr. Bruhn. Dr. Bonnell explained that not all subdural hematomas are lethal.

Dr. Bonnell disagreed with the other doctors that Natalynn died from blunt force trauma. Dr. Bonnell believed Natalynn died from choking and asphyxiation. Further, in Dr. Bonnell's opinion, Natalynn's subdural hematomas were too small to cause death.

Dr. Bonnell stated the bruising on Natalynn's chest could have been caused by chest compressions given to her during CPR. Dr. Bonnell cited recent forensic studies of injuries misinterpreted as being caused by third parties but were the result of CPR. Dr. Bonnell believed many of Natalynn's injuries could be explained by the CPR she received, including injuries and bruising to her upper chest, abdominal bleeding, and injuries to the chin, back, and mouth.

Defendant called David Satterlee, a flight paramedic and expert on resuscitation. Satterlee explained that back blows like the ones the paramedics gave Natalynn were inappropriate in a child older than one year. Additionally, reaching into a patient's mouth to dislodge food or other obstructions is also problematic because it can push the obstruction deeper. Satterlee thought Natalynn's bruising on her back, chin, and chest were consistent with CPR. Satterlee could not rule out the infliction of trauma on Natalynn as the cause of her bruises and injuries.

Prior Injuries to Natalynn

Troy Miller, Natalynn's father, testified he was in a relationship with Nicole Lee for six years and Natalynn was born to them in June 2005. Miller and Lee separated in 2007 when Natalynn was about two years old. Lee had custody of Natalynn and initially lived with their mutual friend, Jessica Rosales. Miller had Natalynn every other weekend and every other Tuesday and Wednesday. Miller eventually rented a house in Tulare about a mile from the McDonald's restaurant discussed later.

Miller described Natalynn as a playful, happy, polite, and well-mannered child. Natalynn was healthy. Natalynn took no medications, she was not accident prone, she was active, and she played well with other children. Natalynn was also respectful of adults. Miller described Natalynn as being coordinated. She liked to climb up the ladder on her bunkbed. Natalynn was not a risk taker and was not hyperactive. Miller described her as calm and truthful.

Lee started dating Andrew Rose. Natalynn liked Rose and would always talk about him. Miller told Lee that if she was going to date, it would be better if she did not bring Natalynn over to the date's home unless it was a serious, long-term relationship. Miller offered to take Natalynn, and she came over to Miller's home sometimes when Lee was dating Rose. Natalynn was always happy to see her mother when Lee picked her up from Miller's home.

Sometime during August 2008, Miller learned Lee was dating defendant, whom Natalynn called "Ry-ry." Miller was concerned Lee was taking Natalynn to sleep over at defendant's house. When Lee's relationship with defendant started, Miller did not notice anything different or unusual in Natalynn's demeanor.

Between September and October, however, Miller started noticing injuries on Natalynn, including bruising on her chest and abrasions on her side. On one occasion, Natalynn attributed an abrasion and scratch to falling off her bike. On another, she said defendant had punched her, and she demonstrated a punching motion. There was another time when Natalynn demonstrated to Miller how defendant had grabbed her and thrown her into what Natalynn described as a "safety sink." Miller later learned the safety sink was actually a metal safe.

Miller noticed the bruises when he bathed Natalynn. In October 2008, Miller also noticed Natalynn had a bowel movement in her pants, which he found strange because she was potty trained. While cleaning Natalynn, he noticed marks inconsistent with a rash. Miller asked Natalynn if someone had spanked her and Natalynn got quiet, would not answer Miller, and became teary eyed. Shown a photograph depicting two bruises on Natalynn's chest, Miller explained they were knuckle sized. When asked how she got these bruises, a teary-eyed Natalynn said defendant was fighting with her.

Miller told Lee during a telephone conversation that Natalynn informed him defendant was fighting with her and asked Lee what was going on. Lee told Miller they were just play fighting. Miller told Lee he was not cool with an adult who could not

control his strength when playing with his three-year-old daughter. Lee told Miller to "F off" and to mind his own business.

Miller was shown a diagram depicting Natalynn in December 2008, with a strawberry scrape mark and abrasion on her right side. Natalynn told Miller she had fallen off a bike when she was with defendant. Natalynn said defendant was watching her. Miller confronted Lee and told her not to leave Natalynn alone with defendant. One time Natalynn was in pain when Miller picked her up. The jury was shown a diagram depicting Natalynn's injuries. This was the incident when Natalynn was thrown into a safe. Lee had told Miller Natalynn was spinning around and fell into a box. Natalynn was upset and trembling as she related what happened. She told Miller she was afraid of defendant.

Natalynn asked Miller to tell Lee she did not want to be around defendant anymore. When Miller asked Natalynn why, she replied defendant hurts her. Miller told Natalynn they would both talk to Lee. Natalynn told Miller she could not talk to her mother and Miller had to do it for her. Natalynn told Miller she wanted to live with him, not with her mother. Miller talked to Lee with Natalynn present. Later, Miller called Lee on the telephone. Miller gave Lee a second warning that if this ever happened again, Miller would "find that mother fucker and … kill him." Lee promised never to let Natalynn around defendant again. Natalynn was elated when Miller told her about her mother's promise not to let defendant watch her again.

Miller was shown another diagram depicting a bruise on Natalynn's head after she supposedly ran into sliding door. For a period of time, Natalynn was very happy during February 2009 and did not speak about defendant anymore. Miller never contacted the police or CPS. In March 2009, Miller understood Lee and Natalynn were moving into an apartment. Natalynn never told Miller that Lee, who had apparently broken up with defendant, had gotten back together with him. Miller was unaware Lee, Natalynn, and defendant were living together in the apartment in March of 2009.

Earlier in March 2009, Miller saw a large bruise on Natalynn, depicted in a diagram at trial. The bruising subsided, but was still visible on Natalynn on March 18, 2009. Natalynn told Miller she was with defendant when the injury happened. Natalynn was constantly crying and upset during this time when he questioned her. Natalynn stayed with Miller on March 18 and he was still unaware defendant was living with Lee. Natalynn was very happy during her stay with Miller, but her demeanor totally changed when her mother was about to pick her up. She began crying. Lee decided to let Natalynn stay with Miller that evening.

The same evening, Miller bathed Natalynn and saw no new bruises on her. Miller got Natalynn ready for school the next morning and Lee picked her up. Miller had to carry Natalynn out because she did not want to go. Natalynn just sat in the car crying. She did not look up at Miller. Miller told Natalynn not to be upset because it was Thursday, and on Friday Natalynn would be staying with him.

Miller expected to see Natalynn that weekend. Instead, he received a call from Lee's mother telling him Natalynn had choked on a piece of pizza, died, and was at the hospital. Miller found Natalynn with her nose smashed sideways on her face and so many bruises on her head and chest he could not count them all.

Ernesto Rosales (Ernesto), Jessica Rosales's brother, said Natalynn was a lovable little girl, and his sister would often take care of her. Ernesto had moved to Texas but was visiting his sister in 2008 and went out with Lee and defendant to a bar. Defendant talked to Ernesto about Lee being his girlfriend and said Natalynn was a cute little girl, but "he had no use for her around him." Ernesto thought defendant was drunk when he made these comments.

Jessica Rosales knew Troy Miller before she knew Lee, but Rosales considered Lee to be her best friend. After Lee was having problems with Miller, she and Natalynn moved in with Rosales. Miller briefly moved in with Rosales and Lee, but the situation did not work out. Rosales sided with Lee and was in an argument with Miller. Rosales

and Lee were both working. Rosales helped Lee with babysitting and would pick up Natalynn from preschool. Rosales would watch Natalynn every day while Lee was at work and on weekends if Lee was working. Rosales acted like Natalynn's mother and actually spent more time with her than Lee.

Rosales described Natalynn as a well-mannered, respectful, and truthful child. Natalynn was healthy until her death and did not require any special medication. Natalynn was not accident prone and did not take risks. Prior to Lee dating defendant, Rosales did not see injuries or bruising on Natalynn except on one occasion when she fell off her tricycle and hurt her knee. Natalynn had a positive relationship with Andrew Rose while Lee dated him. Rosales never saw Natalynn injured during the time she was around Rose.

Lee began to date defendant in August 2008. Natalynn interacted well with defendant when he first started dating Lee. At some point, Lee would spend the night with defendant, who lived with his parents. Natalynn would either stay with Rosales or with Lee. During October and November 2008, Natalynn seemed scared about going to defendant's house. Natalynn asked to stay with Rosales all the time. During this time period, Rosales also began to notice injuries on Natalynn that would always occur when Natalynn was with defendant. Defendant would watch Natalynn when Rosales was unavailable.

Rosales saw a bruise on Natalynn's left cheek in December 2008. Rosales asked Natalynn how she was injured but Natalynn said she could not remember and looked down at the ground. Rosales also saw a bruise on Natalynn's right cheek, along with a cut on the cheek and a cut, swollen lip on December 29, 2008. The lip was cut on the inside. When Rosales asked Natalynn what happened, Natalynn replied she could not say "because mommie would get mad." Rosales persisted and Natalynn told Rosales and two of Rosales's friends that defendant did it. Rosales took a photograph of this injury. This

photograph was admitted into evidence and shown to the jury. Rosales did not take the photograph because of the injury, but because she liked taking pictures of Natalynn.

Diagrams were admitted depicting burns on Natalynn's ears and a bruise on her right shoulder that Rosales saw on February 26, 2009. Rosales took Natalynn to a clinic to be examined by her friend Beatrice Manriquez. Natalynn did not tell Rosales how she received these injuries. Natalynn was always happy staying with Rosales for the night, but did not want to go to defendant's house. Beatrice Manriquez confirmed she examined Natalynn at the clinic and corroborated Rosales's account of Natalynn's injuries.

The first week in March 2009, Lee and Natalynn moved out of Rosales's home and into their own apartment. Rosales later learned defendant was living with Lee and Natalynn. On March 7, 2009, Lee was to bring Natalynn to Rosales's home. Before bringing Natalynn over, Lee called to explain Natalynn had had an accident. When defendant brought Natalynn, Rosales saw a large knot on her head. Rosales photographed the injury, which was admitted into evidence and shown to the jury. Rosales described the knot as the size of a small apple. Natalynn acted lethargic and tired. Rosales asked defendant what happened. Defendant said when Natalynn was reaching into a drawer to get socks, he entered her room and said boo; Natalynn fell and hit her head. On Lee's instructions, Rosales woke Natalynn from her sleep every 20 or 30 minutes. Lee told Rosales not to take Natalynn to the emergency room.

Rosales saw Natalynn two or three times after that. The last time Rosales saw Natalynn was on March 20, 2009. The prior injury was still on Natalynn's forehead, but she had no new injuries. Natalynn acted like a normal three-year-old. Rosales took Natalynn to a friend's house to watch a movie. Defendant made an angry call to Rosales asking where "the fuck" she was because he was waiting outside Rosales's house to pick up Natalynn. Rosales got angry at defendant and hung up on him. She and her friend brought Natalynn back to her home.

Defendant was next to his vehicle, yelling. Lee was looking down. Defendant yelled that Natalynn was not her daughter and questioned why Rosales took so long. Rosales tried to have Natalynn stay with her that evening. Rosales handed Natalynn over to Lee and asked her why she let defendant talk that way. Lee took Natalynn. March 20, 2009, was the last time Rosales saw Natalynn.

Natalynn's preschool teacher did not see Natalynn injured at school. The teacher did see a substantial knot on Natalynn's forehead prior to her death. Joclyn Paez had a small daycare and started watching Natalynn when she was between a year-and-a-half and two years old. Natalynn was sometimes picked up by Miller, Rosales, or Lee. Natalynn never got hurt while at the daycare and was not accident prone. Natalynn was healthy, played well with the other children, and was not a climber. Natalynn's demeanor was always excited when her father picked her up but not excited when Rosales picked her up. One time Natalynn "threw a fit" when Rosales picked her up. Andrew Rose would also pick up Natalynn. Natalynn liked Rose a lot.

Lee enrolled Natalynn into preschool. In February 2009, Lee had Paez babysit Natalynn again two days a week. When Paez cared for Natalynn the second time, her behavior was changed and she was quiet and timid. Natalynn would have no reaction when Lee picked her up. Paez never watched Natalynn after March 5, 2009.

Incidents at McDonald's

Three witnesses saw defendant berate Natalynn at McDonald's on two occasions when her mother was also there. Two witnesses reported the incidents to investigators within weeks of Natalynn's death. One witness had seen pictures of Natalynn and defendant in news stories before telling investigators. One of the workers at McDonald's recognized Natalynn and defendant from video images taken by the restaurant.

Frank Arnold investigated Natalynn's death for the district attorney's office. Arnold questioned Tracy Dysart Griffin, Debra Bentz, and Sabina Cardenas about incidents that had occurred at the McDonald's at Cross and J Streets in Tulare involving

defendant, Lee, and Natalynn. The three witnesses were shown Department of Motor Vehicle photographs of Lee and defendant and a family photograph of Natalynn. Arnold explained he used these three photographs because they were the highest quality pictures he obtained.

Because he was not investigating a crime at the McDonald's itself, Arnold did not use a six-pack photographic lineup with the subject as one of the six people in the lineup. None of the witnesses gave Arnold a prior physical description of defendant. Arnold prepared a standard photographic array that included other pictures as well as defendant's picture, but did not use it.

Sabina Cardenas was questioned by Arnold a year after Natalynn's death. She worked at the McDonald's on J Street in February 2009 between 6:00 a.m. and 1:00 p.m. on weekdays. One midmorning, Cardenas was at her register when she heard a little girl crying. The little girl was sitting at a booth with a man shouting at her. There was also a young lady at the table. The man yelled at the little girl three or four times to "'Shut the fuck up.'" The young woman was just sitting there. Cardenas was close enough to view all three people, including the man.

Cardenas began cleaning an area near the booth the trio were sitting at. Defendant pounded the table with his fists. Cardenas identified Natalynn from a photograph. She identified defendant in court as the man yelling at Natalynn. Cardenas remembered what they looked like but did not see Lee as clearly because she had her head down. Cardenas would not look out into the gallery to identify Lee, who was apparently observing the trial. Cardenas reported the incident to her manager.

On April 2, 2009, Debra Bentz talked to Arnold about an incident she witnessed at the McDonald's on J Street in February 2009. Bentz was dining in a booth with three of her grandchildren one weeknight evening. The grandchildren were between 10 and 13 years old. A little girl was sitting in a high chair with a man and a woman. Bentz and the

man were facing one another. Bentz had not seen these people before. Bentz made eye contact with the little girl and they smiled at each other.

While Bentz was sitting at the booth, the man suddenly raised his left arm and came down to strike the girl's temple with his fist clenched. He stopped his swing right before he would have hit the girl. The man had a grimaced look for several seconds. Bentz was frightened and thought the child's life was in danger and almost jumped up out of her seat. The man told the girl, "'You might get away with that with them, but you won't get away with that with me.'" The girl looked at Bentz, put her head down, and looked frightened. As the man spoke, he left his fist next to the girl's head. The man appeared as though he was trying to get a grip over himself. Bentz described the man's demeanor as angry. The woman in the booth did not say or do anything.

Bentz got a good look at the man and the little girl. Later, Bentz saw a picture on the news of the man and of a little girl who had been killed; she also saw pictures in a newspaper article. They were the same people Bentz had seen in the restaurant. Bentz identified Natalynn as the girl she saw in McDonald's by her photograph and identified defendant in court as the man who threatened Natalynn. Bentz did not see Lee's face directly because Lee was sitting with her back to Bentz. Bentz saw a side view of Lee when Lee left the restaurant. Bentz did recognize Lee from her picture. Bentz was never shown photographic lineups with a display of six women. Arnold did not name Lee, defendant, or Natalynn when he showed Bentz individual photographs of them.

Bentz particularly recalled defendant's eyes and the grimace on his face as he threatened Natalynn. Bentz was contacted twice by Arnold, most recently in 2013. Arnold did show Bentz photographs of different males and Bentz identified defendant. Although she was not positive, Bentz thought she was with her grandchildren on a Thursday or Friday evening because her husband works those evenings and he was not with them. Bentz did not need a photograph of defendant in order to identify him.

Tracy Griffin (formerly Dysart) talked to Arnold on April 1, 2009. She started working at the J Street McDonald's in July 2008 and stopped working there at the end of April 2009. In February 2009, Griffin worked from 7:00 a.m. to 3:00 p.m. between four and five days a week but she did not work weekends. In February or March of 2009, after 10:30 a.m., Griffin was working the front counter when she saw a little girl playing with her food and wanting her toy. A man at the table did not want the girl to play with the food and the toy, he wanted her to sit down. When the girl did not comply, the man reached across the table, grabbed her by the left arm, and pulled her down to sit. The girl fell to her knees in the process. Griffin had seen the man in the restaurant several times, but only remembered the one incident.

Griffin got a fairly good look at the people at the table and could see the girl's face; the little girl looked scared. Griffin reported the incident to her manager. Arnold showed Griffin photographs. Griffin identified Natalynn from the girl in the photograph Arnold showed her and identified defendant in court as the man she saw with Natalynn at McDonald's. She got a good look at defendant in the restaurant. Griffin was able to identify Lee from surveillance video of her at McDonald's, not from seeing her on television. After seeing the video, Griffin identified Lee from the photograph Arnold showed her. Griffin remembered what the trio ordered and how defendant yelled at Natalynn about the "Happy Meal" toy.

Griffin was pregnant at one point and nearly suffered a miscarriage due to stress from this case. A man other than Arnold showed Griffin pictures and she could not identify Natalynn from the pictures he showed Griffin. Griffin wanted the man to leave her alone. The man kept coming to Griffin's home. The man showed Griffin six-pack lineups that included six males including defendant and six females including Lee. Griffin could not identify anyone in those lineups. Griffin remembered seeing the little girl and the man who was mean to her at McDonald's. The lineups had been prepared by Robert Gonzales, a defense investigator, and shown to Griffin. The photographs

Gonzales prepared were not in color but in black and white. Gonzales denied the prosecutor's observation that the pictures were "pretty blurry."

Investigator Arnold obtained 600 hours of video recordings from the Tulare McDonald's from the time period between February 21, 2009, and March 26, 2009. Arnold did not see defendant, Natalynn, or Lee in the recordings. Arnold did not have exact dates from the witnesses. There was one booth where the video cameras did not cover. Arnold carefully viewed recordings from Friday evenings but scanned the remaining video images at fast forward. A defense investigator viewed the video recordings from the Tulare McDonald's and did not see defendant, Natalynn, or Lee in the recordings.

Testimony of Defendant's Family

Maria Jones, defendant's mother, remembered she was weeding in her yard on March 21, 2009, when defendant came over with Natalynn. Natalynn bent down, lost her balance, and looked disoriented. On March 22, 2009, she met defendant, Lee, and Natalynn at a restaurant for lunch. Natalynn had a bruise on her forehead. At lunch, Natalynn ate a little. Later that day, defendant called Maria Jones. He was very upset and said Natalynn got hurt. Maria Jones could not recall what defendant said about how Natalynn was injured. Maria Jones explained that on the way to the hospital with defendant, he was too devastated to talk about what happened except to say he did not know what happened to Natalynn.

Defendant's brother, Kenneth Jones, testified that on March 22, 2009, he went to lunch with defendant, Natalynn, Lee, and his parents. He noticed a very large bruise on Natalynn's entire forehead. One of Natalynn's nostrils was also red and appeared to be infected. When Kenneth Jones asked Natalynn how she was bruised, she said she ran into a sliding glass door. Natalynn did not eat very much at lunch. Defendant told his brother he had swatted Natalynn on her bottom the day of her death.

Kenneth Jones never heard Natalynn complain that defendant played too rough with her. Kenneth Jones asked Natalynn about a monster comment she had directed toward defendant. Natalynn explained she and defendant had been playing by a window. Natalynn was laughing and playful when she explained this to Kenneth Jones. Natalynn also said she thought it may have been a dream.

Jennifer Clinton is defendant's sister. Clinton described defendant as acting like a father to her eldest son when he was an infant and had colic. Clinton was still living at home and defendant would get up at night and take care of the child. A photograph taken by Clinton on March 12, 2009, was admitted showing defendant with Natalynn at a birthday party for Clinton's second son. Defendant had a very special bond with both of Clinton's sons, including when they were both toddlers. According to Clinton, Natalynn liked to play rough with her sons but defendant did not play rough with her and tried to teach Clinton's sons not to play as rough with girls as with boys.

Defendant's Testimony

Defendant explained that on one occasion when Lee and Natalynn were sleeping at his parents' house, Natalynn awoke from her sleep to complain there were monsters at the side of the house. Defendant went outside to run off cats from the side of the house. Natalynn saw defendant through a window and became scared until he showed her there was no monster. Natalynn laughed and said Ry-ry was the monster.

Defendant's nephews liked to jump on him and wrestle. Natalynn became actively engaged in the horseplay with defendant and his nephews. There were times when she would cry. Defendant initially denied providing daycare for Natalynn while Lee worked but conceded he and his parents along with Miller and Rosales provided care as well as Natalynn's preschool.

Defendant explained there was an incident when Natalynn was spinning around and fell in his bedroom. When Natalynn fell, she hit an exposed safe in the closet. Natalynn seemed dazed. Defendant helped her put ice on it. Miller never picked up

Natalynn from defendant's house. Usually, Lee would take Natalynn to and from Miller's home in Tulare. Defendant did go with Lee on some of these journeys.

Defendant denied ever stepping foot inside the McDonald's referred to by other witnesses. Defendant had been to a McDonald's in Tulare at Bardsley, but never to the restaurant at Cross and J Street. Defendant did go to a McDonald's in Visalia with Lee and Natalynn, or with Natalynn and his mother.

According to defendant, there were several times when Natalynn acted out in public by crying, "throwing a fit," refusing to eat her food, going under the table, or sitting on the table. Defendant denied spanking Natalynn during any of these incidents. Defendant said he did spank Natalynn on the bottom with his open hand on March 22, 2009. He denied ever using his fist on Natalynn. Defendant spanked Natalynn once at his parents' house when she started throwing toys. Another time defendant spanked her in the restroom of a restaurant.

Defendant denied telling anyone he had no need for Natalynn. Defendant said there was conflict in his relationship with Rosales. Defendant said Rosales did not tell the truth. Defendant insisted Natalynn wanted to be with him more than with Rosales and this caused conflict between Rosales and defendant.

Defendant explained that Lee and Natalynn moved into their new apartment on March 6, 2009. The following day, defendant walked into Natalynn's bedroom and found her on top of her bed reaching into a dresser drawer to get a pair of socks. When defendant asked Natalynn what she was doing, she was startled and fell off the bed and bruised her head. It looked serious to defendant, who picked up Natalynn, got ice to put on her head, and drove her to Lee's place of work. Lee looked at the injury and called her mother. Defendant denied he intentionally scared Natalynn.

According to defendant, Natalynn ran into a sliding glass door about a week later. On March 21, 2009, Natalynn came over to defendant and told him she put a shell up her nose. Defendant said he carefully worked the shell out of Natalynn's nose with toilet

paper and his fingers because he did not want to push the shell further into Natalynn's nostril.

On March 22, 2009, defendant went with Lee and Natalynn to a swap meet and then to a store before meeting defendant's parents for lunch. Defendant explained Lee left for work between 4:30 and 4:45 p.m. Defendant described Natalynn as running back and forth between watching television, going in her bedroom, and working on crafts with her mother at the table. When Lee left for work, Natalynn began crying. Defendant warned Natalynn to stop but she continued, so defendant spanked her twice on the bottom.

Defendant said after he spanked Natalynn, she started running around again and ran into the wall, hitting her temple. According to defendant, Natalynn whimpered a bit and rubbed her head. Natalynn's head turned red. Defendant kissed Natalynn's head and she continued to run. As he was sitting and watching television, defendant heard a thud from Natalynn's room and called out to her. When defendant heard nothing, he walked into the room and saw Natalynn on the floor hugging a sleeping bag cover. Defendant thought she had fallen asleep.

Defendant said he lifted Natalynn up and placed her on her bed. Natalynn's eyes were open but the pupils were rolled back and he could not see them. Defendant panicked and called Natalynn's name but she did not respond. Defendant took Natalynn to the kitchen and put her underneath the faucet to run water on her face. Natalynn made a sucking sound like she was sucking the water in. Her stomach was full and bloated like there was something in it and she was not breathing. Defendant pushed Natalynn's stomach. There was no response so defendant blew air into Natalynn's mouth.

Defendant brought Natalynn to the living room and laid her on the carpet. He opened her mouth and was able to get his finger into the mouth as far as he could reach. Nothing came out. Defendant brought Natalynn back into the kitchen, started hitting her back, and called 911. Defendant thought five or six minutes had passed from when he

found Natalynn in her room to when he called 911. Natalynn vomited some liquid. Defendant said he was trying to save Natalynn. Defendant took Natalynn outside right when the police and paramedics arrived. Defendant asserted he did not know what happened to trigger Natalynn's condition.

DISCUSSION

1. Identification Procedures

In pretrial motions, the People filed a motion to admit incidents of uncharged conduct of verbal abuse and assault directed at Natalynn by defendant at the McDonald's restaurant in Tulare. Defendant opposed the People's motion and filed his own pretrial motion to have this evidence excluded on the basis Frank Arnold's identification procedure was unduly suggestive. The trial court ruled the evidence was admissible, rejecting defendant's argument on the totality of the circumstances.

Defendant contends Cardenas, Griffin, and Bentz, the witnesses who identified him as being at McDonald's with Lee and Natalynn, were subjected to suggestive identification procedures because Arnold showed them single photographs of each subject prior to asking them for descriptions of each person. Defendant argues the trial court erred in failing to grant his pretrial motion to exclude this testimony and he was prejudiced by its admission. Under the totality of the circumstances, we no find error.

Analysis

When challenging a lineup as suggestive or tainted, the defendant bears the burden of showing unfairness as a demonstrable reality, not just by speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1221-1222; *People v. Ochoa* (1998) 19 Cal.4th 353, 412.) The question of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances. In making the second determination, courts evaluate factors such as the opportunity of the

witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his or her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. "'If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.'" (*People v. DeSantis*, *supra*, at p. 1222; see *People v. Thomas* (2012) 54 Cal.4th 908, 930-931.)

A due process violation occurs only if the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (*Simmons v. United States* (1968) 390 U.S. 377, 384; *People v. Cook* (2007) 40 Cal.4th 1334, 1355.) A single person showup is not inherently unfair. A procedure is unfair that suggests the identity of the person suspected by the police in advance of the witness's identification. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.)

Although a single-suspect identification procedure generally is not the ideal or preferred method and can pose a danger of suggestiveness, it is not necessarily unfair. (*People v. Clark* (1992) 3 Cal.4th 41, 136, abrogation on other grounds recognized in *People v. Pearson* (2013) 56 Cal.4th 393, 462; see *People v. Medina* (1995) 11 Cal.4th 694, 753.) Having a witness view a single photograph of the defendant is not more impermissibly suggestive than an in-court identification of the defendant sitting at the defense table in the courtroom. (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1008-1009.) Other than the use of single photographs for each subject, there is nothing else in the record to suggest Arnold encouraged Cardenas or Bentz to identify defendant. (*People v. Nguyen* (1994) 23 Cal.App.4th 32, 39.) On the other hand, the single-photograph procedure has been criticized. (See *People v. Contreras* (1993) 17 Cal.App.4th 813, 820.) Assuming arguendo the procedure used here was unduly suggestive, we review the identification process under the totality of the circumstances to determine if it was unfair.

Cardenas was contacted by Arnold about a year after Natalynn died. Cardenas, however, paid close enough attention to the incident and had reported it to her supervisor. This incident was noteworthy because defendant told a very young child to "shut the fuck up" four different times and left Natalynn crying at the table. Cardenas also cleaned the table next to defendant, Lee, and Natalynn and got a good look at all three of them before they left the restaurant. Cardenas was certain of her identification at the time she made it to Arnold and at defendant's trial. Although Cardenas was reluctant to identify Lee at defendant's trial, she explained this was because she apparently did not want to look at Lee in the gallery. Cardenas was confident of her identification of defendant and Natalynn.

Griffin was able to identify defendant and Natalynn. Griffin made a positive identification of defendant in court. Arnold showed Griffin photographs. Griffin identified Natalynn from the girl in the photograph Arnold showed her and identified defendant in court as the man she saw with Natalynn at McDonald's. She got a good look at defendant in the restaurant. Griffin was able to identify Lee from surveillance video of her at McDonald's, not from seeing her on television or from the photograph Arnold showed her. Griffin remembered what the trio ordered and how defendant had yelled at Natalynn about the Happy Meal toy.

Bentz apparently had a clearer view of defendant and Natalynn than she did of Lee. Bentz reported the incident to Arnold less than two months after it happened and less than two weeks after Natalynn died. Bentz only saw Lee from behind while she sat but could see her profile as Lee left the restaurant. It is reasonable to infer Bentz also saw Lee's body at the same time. Because Bentz did not see the front of Lee's face during the McDonald's incident, she forthrightly told Arnold and testified at trial that Lee looked like the woman in the restaurant the day of the incident.

The unique circumstances of defendant's behavior—yelling at and nearly hitting a small child only three and a half years old—made both encounters uniquely memorable

and noteworthy. The witnesses were not identifying a single suspect to a crime occurring in a dark alley. Defendant's conduct occurred inside a restaurant with presumably good lighting. The witnesses were identifying a mother, her daughter, and the mother's boyfriend, who were dining together. Bentz and Cardenas were sure of their identifications of defendant and Natalynn. Griffin was positive of her identification of defendant, Lee, and Natalynn. Also, Griffin was able to identify Lee from video recordings even though the defense investigator and Arnold could not definitely find any of the trio in video recordings. All three witnesses positively identified defendant in court. Such identifications need not be excluded, even where the witness previously failed to identify a suspect. (*People v. Dominick* (1986) 182 Cal.App.3d 1174, 1196-1197; see *People v. Contreras*, *supra*, 17 Cal.App.4th at p. 822.)

It is far less probable three independent witnesses to two separate events would misidentify defendant under circumstances where the same three people were at the same restaurant in Tulare, a small community. As noted above, Arnold did not directly encourage Cardenas, Griffin, or Bentz to positively identify defendant, Lee, or Natalynn. Furthermore, the circumstances of the photographic identification procedure were disclosed to the jury, the witnesses were subjected to thorough cross-examination, and the jury was allowed to evaluate the reliability of the witnesses' identifications. (*People v. Alexander* (2010) 49 Cal.4th 846, 903.) Evidence with some element of untrustworthiness is customary grist for the jury mill; jurors are not so gullible they cannot intelligently measure the weight of identification testimony with some questionable feature. (*Ibid*.) Under the totality of the circumstances, we find the identifications of defendant by Bentz, Griffin, and Cardenas were reliable. We also find the identifications of Lee and Natalynn reliable under the totality of the circumstances.

Harmless Error

Even if we were to find the identification procedures unduly suggestive and unfair under the totality of the circumstances, we would find the error harmless. The People's

case against defendant was particularly strong. Defendant was alone with Natalynn when she died. No other person was present. The consensus of the medical experts was that Natalynn was already dead when defendant brought her outside where police and paramedics tried in vain to revive her.

There was evidence defendant had physically abused Natalynn for a period of months prior to her death, and he told others he had no use for her. The opinion of three expert physicians trained extensively in pathology, including the medical examiner, was Natalynn died from multiple blunt force trauma inflicted in a short time span. These doctors found it extremely improbable Natalynn's fatal brain injuries were self-inflicted or caused by accident based on the incidents relied upon by defendant. Only one doctor called by the defense opined Natalynn died by asphyxiation on something she vomited and her subdural hematomas were not a cause of death.

Defendant's account of how Natalynn died was implausible in light of the medical evidence showing the range of external injuries plainly visible from autopsy photographs. Defendant's original account of how Natalynn injured herself was not consistent with the external injuries she suffered over her entire body, including her limbs, chest, back, and head. The defense that Natalynn died by accident, from E. coli bacteria acquired from a clam shell, or by asphyxiation was implausible in light of the weight of the testimony of medical experts opining Natalynn died from multiple blunt force trauma. The accounts of defendant's conduct at the McDonald's on different occasions was cumulative of other substantial evidence, including Natalynn's prior injuries while staying with defendant and defendant's negative comment about Natalynn to Ernesto Rosales indicating defendant's animus toward Natalynn. Furthermore, the identifications were not critical to characterizing defendant as a culprit in Natalynn's death. Defendant was the lone adult caring for Natalynn and brought her outside to police officers as she was dying or already dead. The incidents at McDonald's were admitted to refute defendant's assertion

Natalynn died accidentally or from asphyxiation and were relevant only to uncharged acts showing intent or lack of accident. (See Evid. Code, § 1101.)

The trial court did not abuse its discretion in admitting the identifications challenged by defendant. Defendant has failed to demonstrate prejudice under either state law (*People v. Watson* (1956) 46 Cal.2d 818, 836) or the federal Constitution (*Chapman v. California* (1967) 386 U.S. 18, 24). (*People v. Riccardi* (2012) 54 Cal.4th 758, 827.)

2. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor's closing argument improperly appealed to the passions of the jurors. Although the trial court agreed a line of closing argument advanced by the prosecutor improperly appealed to the jurors' passions, the trial court found the error harmless when it denied defendant's motion for a new trial. Defendant argues the error constituted prosecutorial misconduct, the trial court compounded the error by failing to give the jury an admonition to disregard the prosecutor's comments, and the error was prejudicial. We disagree.

Prosecutor's Argument and Motion for New Trial

The prosecutor carefully marshalled and argued all of the evidence she believed supported the theory defendant tortured Natalynn and committed first degree homicide. As the prosecutor was finishing her initial closing argument to the jury, she referred to Miller as Natalynn's protector and mentioned Natalynn did not want to go back with the "monster." The prosecutor referred to a photograph of Natalynn taken days before her death and said, "That frozen moment in time where she's happy and she's safe, and look at that little face—" The trial court sustained defense counsel's objection to this statement. The prosecutor next said, "It's the natural order. The natural order in life is for parents—for parents to precede their children in death. The parent is the protector,

the provider—" Defense counsel lodged an objection. The court told the prosecutor, "Let's just talk about the evidence."

The prosecutor proceeded with this statement: "It's that cycle of life. You're there for that child when they take their first breath and they're there in turn for the parent." Defense counsel objected. The court noted it was closing argument and told the prosecutor to proceed. The prosecutor again talked about the natural order of life, the greatest moment for a parent is the birth of a child, the parent witnesses the child's first breath, and the child has to be there when a parent dies. Just as the prosecutor was about to talk about receiving a call at work about her own mother, defense counsel objected on the basis of improper argument. The court overruled this objection.

The prosecutor argued most people can look back at their history with a parent, but it was the reverse for Miller who no longer had a future with Natalynn. The prosecutor stated, "Defendant tortured and killed Natalyn [*sic*]. When Natalyn was murdered, that violated nature's way and [Miller] doesn't have a future with this little girl. [Miller] doesn't. [Miller] gets the call …." The trial court sustained defense counsel's objection that the argument was improper.

The prosecutor referred to Miller going to the hospital after learning Natalynn was dead and seeing the state of her body. The prosecutor again said Miller had no future with his daughter. In sustaining defense counsel's objection to this point, the trial court told the prosecutor to "[g]et on to something else." The prosecutor once more said Miller did not "get to think about the future with that little girl." Defense counsel objected, asking the court for an admonition. The court replied, "Yeah," and told the prosecutor, "I told you, once again, on to another issue." The trial court, however, did not give the jury a limiting instruction. The prosecutor proceeded with her argument that Natalynn spent her last hour on earth before she was tortured and killed with the one person she was afraid of and who she wanted nothing to do with. The prosecutor described this as a terrifying time to know what was coming. The prosecutor then asked the jury to convict

defendant of first degree murder and to find the torture special circumstance true based on overwhelming evidence. Defense counsel did not object to these statements by the prosecutor.

In his closing argument, defense counsel explained the issues to be determined by the jury were not encompassed in whether Troy Miller was aggrieved. Defense counsel noted he was not unsympathetic to Miller and could not imagine anything worse than losing a child. Counsel explained he had objected to the prosecutor's argument because Miller's loss was not a consideration in determining defendant's guilt. Counsel argued: "You may not decide this case based upon passion or prejudice. And those objections were sustained. It's not a consideration for you at this point …." In her rebuttal argument to the jury, the prosecutor carefully argued the evidence she thought supported first degree murder and the torture special circumstance without further references to Miller.

As one ground for his motion for new trial, defendant argued the prosecutor had committed misconduct by referring to her own mother's death, by using a photograph of Natalynn to evoke sympathy, and by arousing passion and prejudice in asserting defendant had violated "nature's way." Defendant further argued the trial court erred in failing to admonish the jury concerning the prosecutor's argument.

In denying the motion for new trial, the trial court noted the thrust of defendant's motion was his argument the prosecutor had appealed to the passions of the jury by mentioning the unnatural order of things when a child dies before a parent. The court said the third time defense counsel objected, the court sustained the objection and told the prosecutor to move on with her closing argument. Because the prosecutor did move on to other points, the court stated it did not think an admonishment to the jury was needed. Referring to *People v. Vance* (2010) 188 Cal.App.4th 1182 (*Vance*), the trial court noted the prosecutor's argument there appealing to the jury to step into the shoes of the victim and the victim's family was prejudicial because the jury found the defendant guilty of

first degree murder and the jury may not have considered a verdict on a lesser included offense. The court noted in this case, the jury rejected the prosecutor's argument that defendant committed first degree murder and found him guilty of the lesser included offense of second degree murder.

Analysis

A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct. Reversal under the federal Constitution is necessary only when these methods infect the trial with such unfairness as to make the resulting conviction a denial of due process. (*People v. Salcido* (2008) 44 Cal.4th 93, 152, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) A prosecutor's conduct not rising to the level of a constitutional violation is misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that can be drawn from the evidence. (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.)

During the guilt phase of a trial, it is improper for a prosecutor to appeal to sympathy for the victim. The prosecutor's introduction of victim-impact testimony is impermissible in the guilt phase of a capital trial. (*People v. Salcido, supra,* 44 Cal.4th at p. 151.) It is misconduct for the prosecutor to argue during the guilt phase of a capital case, or in a noncapital case, that the jury consider the impact of the crime on the victim's family. (*Vance, supra,* 188 Cal.App.4th at pp. 1193, 1199.)

In *Vance,* the prosecutor extensively argued the jury should walk in the victim's shoes and the jurors should relive the crime in his or her own mind's eye. The prosecutor asked the jury to consider the victim's feelings. The prosecutor referred to facts not in evidence and asked the jury to consider what the victim might be thinking as he was dying, presenting an improper "Golden Rule" argument. (*Vance, supra,* 188 Cal.App.4th at p. 1194, 1198.) The prosecutor argued the jury should consider the last moments of

the victim's life and referred to the hopes of the victim being crushed. (*Id.* at p. 1195.) The prosecutor referred to the lives that were touched by the victim and referred to the defendant as being a pitiful human being. (*Id.* at p. 1196.)

Objections to relevancy and improper argument were sustained by the trial court. (*Vance*, *supra*, 188 Cal.App.4th at pp. 1194-1196.) Defense counsel in *Vance* then objected to the prosecutor's statements as inflaming the passions of the jury and rising to the level of prosecutorial misconduct. The trial court denied a motion for mistrial. (*Id.* at pp. 1196-1197.) The court in *Vance* found impermissible both the Golden Rule argument—argument for the jury to place itself in the place of the victim—and victim impact evidence. (*Id.* at pp. 1198-1200.) In addition to these acts of misconduct, the prosecutor commented that defense counsel was objecting because counsel believed the prosecutor was painting too graphic a picture. (*Vance*, at pp. 1194, 1200.) *Vance* found this conduct portrayed defense counsel as a villain, which is also impermissible. (*Id.* at pp. 1200-1201.)

Vance found these errors to be prosecutorial misconduct and reversible. (*Vance*, *supra*, 188 Cal.App.4th at pp. 1202-1207.) The court in *Vance* was particularly concerned the prosecutor's argument undermined the defendant's attempt to show his offense was second degree rather than first degree murder. The court in *Vance* observed the defendant did not dispute all liability and was willing to admit the evidence was sufficient to support a conviction for second degree, but not first degree, murder. Because the case was close on the degree of the defendant's culpability, the prosecutor's sustained Golden Rule argument tipped a very delicate balance and qualified as prejudicial. (*Id.* at pp. 1202-1203.) This was especially true because the trial court had failed to give the jury a proper admonition to disregard the prosecutor's improper argument. (*Id*. at p. 1206.)

We agree with defendant, and the People concede, the prosecutor's Golden Rule argument introduced improper victim impact evidence during the guilt phase of trial.

Unlike the comments by the prosecutor in *Vance*, however, the prosecutor's conduct was not egregious or prolonged. Several times, and over defense objections sustained by the trial court, the prosecutor in *Vance* continued with the Golden Rule argument. The prosecutor in *Vance* further exhorted the jury to consider the impact the victim's death had on those who knew him and also disparaged defense counsel. The trial court in *Vance* failed to give a limiting admonition to the jury.

Golden Rule Argument

To the extent the prosecutor's statements concerning the fear Natalynn experienced constituted improper Golden Rule argument, defense counsel lodged no objection to these comments. Defense counsel did lodge timely objections to the prosecutor's victim impact statements in closing argument. The failure to lodge a timely objection on the proper ground to alleged prosecutorial misconduct constitutes a forfeiture of the issue on appeal. (*People v. Mendoza* (2007) 42 Cal.4th 686, 705.)

Turning to the merits of the argument, we note here, in contrast to the prosecutor's comments in *Vance*, the prosecutor did not continue with improper argument after the objections were sustained. The prosecutor pointed out Natalynn was with a person she feared and did not want to be with, and she must have been terrified before she was tortured and killed. The prosecutor, however, never asked the jurors to place themselves in her shoes. Where there is misconduct, it is not prejudicial where the comment was brief and the prosecutor did not return to the topic. (*People v. Mendoza*, *supra*, 42 Cal.4th at p. 704 [misconduct for prosecutor to mention victim's terror as defendant put gun to her head, but not prejudicial where comment brief and not repeated].)

The aspect of the prosecutor's argument concerning Natalynn's fear of the defendant was fair commentary based on testimony from several witnesses. Natalynn's fear of defendant was relevant to refute defendant's contentions Natalynn died by accident and she preferred to be with him rather than her father. The prosecutor's references to defendant's torture and murder of Natalynn were based on the People's

theory of the case. The remainder of the prosecutor's lengthy closing argument, taken as a whole, focused on the evidence and the trial testimony supporting the prosecutor's theory of first degree murder with a torture special circumstance. Prosecutors are given wide latitude in oral argument, which can be vigorous as long as it focuses on fair comment on the evidence. A prosecutor is not limited to Chesterfieldian politeness and may use appropriate epithets. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) The prosecutor's description of how Natalynn was beaten to death and defendant's violent capabilities were fair comments on the evidence presented at trial. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.)

Victim Impact Argument

The prosecutor briefly commented on how cute Natalynn looked in a photograph, but made the comment in the context of what Miller lost and the future relationship between father and daughter that was lost. The prosecutor said this on the theme of Miller's loss of a future relationship with Natalynn and how Natalynn's death went against the natural order of life and death between generations. We note there were multiple victim impact comments, they were short in duration, they were limited to Miller, and they pointed out the clearly obvious reality that Miller lost a future relationship with Natalynn. It is unlikely the prosecutor's comments concerning the impact of defendant's crime on Miller swayed the jury, especially where, as here, defense counsel responded effectively to the prosecutor's arguments during his own closing argument. (See *People v. Martinez*, *supra*, 47 Cal.4th at p. 957.)

Absence of Admonishment and Prejudice

Although the trial court did not admonish the jury to disregard the prosecutor's comments at the time they were made, immediately before closing arguments, the jury received instructions on the duties of the jury focusing on how the jurors decide the facts

and directing the jurors to not let bias, sympathy, or prejudice influence their opinion.[5] The jury received the reasonable doubt instruction set forth in CALCRIM No. 220, emphasizing defendant's presumed innocence and stating the jury "must impartially compare and consider all the evidence that was received throughout the entire trial." The jury was further instructed with CALCRIM No. 222 on its duty to decide the facts, evidence, the sworn testimony of witnesses, and exhibits admitted into evidence. This instruction admonishes the jury that the statements of the attorneys in opening and closing statements are not evidence and only the sworn testimony of witnesses and admitted exhibits are evidence.[6] This instruction also advised the jury not to consider matters upon which the court sustained an objection.

---

[5]CALCRIM No. 200:

"Members of the jury, I will now instruct you on the law that applies to this case. Each of you has a copy of these instructions to use in the jury room.

"You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial.

"Do not let bias, sympathy, prejudice, or public opinion influence your decision. Bias includes, but is not limited to, bias for or against the witnesses, attorneys, defendant or alleged victims, based on disability, gender, nationality, national origin, race or ethnicity, religion, gender identity, sexual orientation, age, or socioeconomic status.

"You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

[6]The jury was instructed as follows with CALCRIM No. 222:

"You must decide what the facts are in this case. You must use only the evidence that was presented in this courtroom. 'Evidence' is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

"Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

"During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess

Jurors are presumed to understand and follow the trial court's instructions. (*People v. Martinez, supra*, 47 Cal.4th at p. 957; *People v. Sanchez* (2001) 26 Cal.4th 834, 852.) These instructions effectively advised the jurors to focus on the evidence, avoid passion in their deliberations, and to consider evidence over the arguments of counsel. Defense counsel further effectively challenged the prosecutor's argument, appealing in his own closing argument for the jury not to be moved by passion but to employ reason to the evidence presented at trial. These instructions, coupled with the trial court sustaining defense counsel's objections to the prosecutor's victim impact comments, were sufficient to overcome any sympathy or prejudice evoked by the prosecutor.

As noted, the scope of the prosecutor's comments was far less extensive than the prosecutor's prolonged and far ranging comments in *Vance*. All of the prosecutor's challenged closing argument occurred in five pages of reporter's transcript. The prosecutor's closing statements were about 71 pages of reporter's transcript. Defendant counsel's closing statements were approximately 120 pages of reporter's transcript. The jury heard testimony from some 40 witnesses, including defendant. Given the long duration of closing arguments by both parties, the limited scope of the challenged argument, and the volume of testimony, we find the challenged argument to be a small part of the argument to the jury and of the trial. Unlike the prosecutor's closing argument in *Vance*, the prosecutor here never disparaged defense counsel, limiting her disagreements with defense counsel in the interpretation of how Natalynn died based on the evidence adduced at trial.

The People further observe that unlike *Vance* where the defendant was convicted of first degree murder in a close case on the degree of the defendant's culpability,

---

what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose."

defendant here was convicted only of second degree murder. Defendant was also convicted of assault causing the death of a child. The jury further rejected the torture special circumstance after lengthy deliberations. The jury also clearly rejected defendant's theory Natalynn died by accident or from asphyxiation. The People correctly observe there is no evidence to support a voluntary manslaughter conviction. Voluntary manslaughter is supported by evidence of provocation, an unreasonable but good faith belief in having to act in self-defense, or in a sudden quarrel or heat of passion. (§ 192; *People v. Montes* (2003) 112 Cal.App.4th 1543, 1548.) There was no evidence proffered that when she died, a very small three-and-a-half-year-old Natalynn provoked, got into a sudden quarrel with, or caused defendant to act in unreasonable self-defense. According to defendant, he did not know how Natalynn died. Defense theories of Natalynn dying as a result of E. coli exposure from a shell she allegedly placed in her nose or from asphyxiation from food she vomited were not consistent with defendant's assertions Natalynn died from accidental, self-inflicted injuries.

It is not reasonably probable a result more favorable to defendant would have been reached absent the misconduct or with a curative instruction. (*People v. Arias* (1996) 13 Cal.4th 92, 161 [jury failed to reach verdict after lengthy deliberations on enhancements ultimately dismissed].) Given the strength of the People's case against defendant, there is no reasonable probability the prosecutor's brief and isolated comments could have influenced the jury's guilt determination. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 957; *People v. Medina* (1995) 11 Cal.4th 694, 759-760.) The misconduct was not prejudicial given the very strong evidence of defendant's guilt. (*People v. Martinez*, *supra*, at p. 957; *People v. Mendoza*, *supra*, 42 Cal.4th at p. 704.) We find no prejudicial error under the state or federal Constitution.

3. Cumulative Error

Defendant contends the combination of errors in his trial have created prejudicial cumulative error. Prosecutorial misconduct can synergistically create an atmosphere of prejudice more intense than the sum of its parts. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1350.) Even considering the limited number of errors together, including prosecutorial misconduct and the alleged suggestive photographic identifications, we find the cumulative prejudice flowing from them did not render defendant's trial fundamentally unfair. (*Ibid*.)

DISPOSITION

The case is remanded for the trial court to prepare a new amended abstract of judgment reflecting defendant was convicted of second degree murder in count 1 and assault resulting in the death of a child, a violation of section 273ab, subdivision (a), in count 2. Defendant's sentence on count 1 was stayed. The amended abstract of judgment should further reflect defendant received credits for pretrial time in custody but not conduct credits. The trial court shall forward the amended abstract of judgment to the appropriate authorities. The judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
GOMES, Acting P.J.

_____
DETJEN, J.